INDEX

	Page
Opinion	1
Jurisdiction	1
The question	2
Statement	2
Summary of argument	6
Argument	6

AUTHORITIES CITED

United States v. *Smith*, 94 U. S. 214	8
United States v. *Wyckoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263	8
Judicial Code, sections 242 and 243	1

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 100

THE UNITED STATES, APPELLANT

v.

BURTON COAL COMPANY

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

OPINION

The opinion of the Court of Claims (R. 36–39) is reported in 60 Ct. Cls. 294.

JURISDICTION

Judgment in this case was rendered on February 2, 1925. (R. 40.) The petition for appeal was filed April 14, 1925, and allowed April 20, 1925. (R. 40.) The jurisdiction of this Court is invoked under Sections 242 and 243 of the Judicial Code, as they stood prior to the effective date of the Act of February 13, 1925 (chap. 229, 43 Stat. 936).

THE QUESTION

The question is whether the Court of Claims applied the proper measure of damages.

STATEMENT

This is a suit brought by appellee in the Court of Claims to recover damages because of the alleged breach by the Government of a contract for the purchase of coal by the Government from appellee. The facts as found by the Court below are as follows:

The appellee is an Illinois corporation. It was organized under the name of Wickham & Burton Coal Company, and under such name the contract here in question was made. The name was changed to the Burton Coal Company by amendment of its Articles of Incorporation. (R. 22.)

A formal contract dated September 10, 1920, was entered into between appellee and the Government (R. 22) which provided for the furnishing and delivery by appellee to the Government of 150,000 tons of coal at a price of $6.75 per ton, to be delivered "approximately 1,600 tons per week from White Ash, Ill.; approximately 2,000 tons per week from Paradise, Ill.; approximately 2,500 tons per week from Freeman, Ill." (R. 25). Shipping instructions were to be given by the Government. (R. 25.)

The appellee was engaged solely as a selling company and was not the owner or operator of any coal mine or mines or the owner of any interest in either

of the three companies owning or operating the mines mentioned in the contract as the mines from which the coal was to be furnished. (R. 29.)

The contract further provided that if the contractor was unable to furnish coal from the mines named because of strikes, interruptions to transportation, shortage of railroad or water transportation equipment, or any other condition general in its nature, for which the contractor is in no way responsible, the contractor should have the right to furnish coal from other mines producing coal acceptable to the Government. (R. 26.)

Appellee had selling contracts with the owners of such mines under which it sold coal to purchasers under contracts between appellee in its own name and such purchasers; and appellee, under contracts with two of these companies, financed the operation of said mines by advancing the necessary funds for meeting their pay rolls, which was the general custom and practice of selling companies at that time. The other mine was similarly financed by another selling company. (R. 30.) The general practice or custom was not to mine the coal until orders for sales were received, and to load the coal directly on the cars as mined. This course was followed in the mining and delivery to the Government of the coal under the contract here in question. (R. 30.)

After some negotiations and correspondence (R. 31) the Government, by letter dated March 7, 1921 (R. 32), notified appellee that the remaining

undelivered portion of the coal was cancelled. Appellee was ready, able and willing to furnish and deliver the coal in accordance with the contract, and repeatedly requested of the Government officials shipping instructions for the undelivered portions, but no instructions were thereafter given. (R. 33.) The appellee delivered a total of 53,146 tons of coal, for which it was paid the contract price of $6.75 per ton, leaving a total of 96,854 tons undelivered. (R. 33.)

On August 6, 1920, appellee, pursuant to its agreement with the Army officers as to the terms of the contract with the Government, entered into an agreement with the Freeman Coal Mining Company, the operator of one of the mines from which part of the coal was to be furnished, which in substance made appellee the broker for the owner of the Freeman mine for the coal which was to be delivered from said mine under the Government contract. (R. 34.) This contract provided (R. 35):

> The matter of commissions to be paid by Freeman Coal Mining Company on account of this business has not been adjusted. It is referred to Frank Crozier, whose decision shall be binding.

Appellee, by agreement with the companies owning the mines from which this coal was to come, had fixed the amounts per ton of its profits on this coal, and had the privilege, in case of a car shortage or other emergency, of decreasing the quantity of the coal to be furnished by either of

said companies. (R. 35.) The difference between the contract price of said 96,854 tons of coal handled under the contract, and its market value at the mines from February 9 to March 9, 1921, was $4.60 per ton, or a total of $445.528.40. (R. 35.) The difference between the contract price of said undelivered coal and the cost of production by the mining companies was $4.34 per ton, or a total of $420,346.36. (R. 35.) The profits that it appears would have been realized by appellee upon this undelivered coal would amount to $46,065.97. (R. 36.)

At first the Court of Claims held that the appellee could not recover, and ordered the dismissal of the petition. (R. 21.) A motion for a new trial by appellee was granted. (R. 22.) The Government contended that under Section 2 of Paragraph 9 of the contract (R. 10) the Quartermaster General had a right to terminate the contract at any time in the public interest, and that in the event of such termination the contract fixed the rights of the appellee and the elements which it might recover, none of which elements had been proven. The Court of Claims held that the contract required the personal consideration and act of the Quartermaster General, and that it did not appear that the Quartermaster General had passed upon this cancellation or ordered the same, and that, therefore, the Government was liable for a breach of the contract, and allowed a recovery of the difference between the market value of the coal

and the contract price, amounting to a total of $445,528.40. (R. 36–39.)

SUMMARY OF ARGUMENT

Assuming, without conceding, that the Government's termination of this contract was not within its rights, and that the same constituted a breach of the contract for which it is liable in damages, the measure of such damages in this case is the loss sustained by appellee, which is the profit of $46,065.97. The Court of Claims applied the wrong measure of damages, in view of the facts in this case, when it allowed a recovery of the difference between the contract price and the market price.

ARGUMENT

THE COURT OF CLAIMS APPLIED THE WRONG MEASURE OF DAMAGES

In some cases, in the event of a breach of a contract by the Government, the difference between the market value of the articles to be delivered thereunder and the contract price thereof might be a proper measure of damages. In view of the particular facts in this case that measure and rule becomes wholly inapplicable. The record conclusively shows that appellee owned no coal mines and produced no coal. At the time of the cancellation the appellee did not own a single ton of coal which it had purchased for the performance of this contract; the findings do not show that any such coal was subsequently delivered to it; and, on the contrary, show that, at the time of the cancel-

lation, the remaining coal had not even been produced from the mines. The findings fail to show that appellee was required to take or pay for any of the coal which was cancelled or that it suffered any loss whatever because of the cancellation, except the profits which it might have earned upon a commission basis had the contract been fully performed.

The findings show that while appellee had contracts with the owners of the three mines designated in the contract with the Government (at least one of which contracts was made after the negotiations with the Government concerning its contract) appellee, by agreement with said companies, had the privilege in case of a car shortage or other emergency of decreasing the quantity of coal to be furnished by either of said companies. (R. 35.)

The findings fail to show that any of the three companies owning these mines delivered any of the cancelled coal to appellee, or even requested appellee to take the same, and also fail to show that appellee suffered any loss in arranging with said companies to not make any deliveries of such coal. The appellee is claiming for the damages which it suffered. It does not make any claim for damages suffered by the three operating companies. The petition itself in this case alleges that (R. 5)—

> Petitioner alleges further that it is the sole owner of the above claim; that no as-

signment or transfer of same or any part thereof has been made; that petitioner is justly entitled to the amount claimed from the United States after allowing all just credits and offsets.

Therefore petitioner should be permitted to recover, if anything, only the loss which it actually sustained; and the only losses shown by the record to have been sustained by appellee are the anticipated profits upon the cancelled coal, which would have amounted to $46,065.97. These were prospective profits, but they are the only conceivable losses which the record shows appellee could possibly have sustained. It is a well recognized rule of law that the correct measure of damage is the loss actually sustained because of the breach by the Government. (*United States* v. *Smith*, 94 U. S. 214, 218, 219; *United States* v. *Wyckoff Pipe & Creosoting Co., Inc.*, decided May 24, 1926, 271 U. S. 263.) The judgment left the respondent in a better position than if the contract had been performed. If the case was decided by the Court of Claims on the wrong theory the judgment should be reversed and a new trial granted.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

NOVEMBER, 1926.

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